Nos. 839, 119

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the United States District Court for the District of Nebraska, Omaha Division, is not yet reported. The report of the Interstate Commerce Commission is reported in 287 I. C. C. 611. The court's opinion, findings of fact, and conclusions of law are set forth in Appendix A, *infra*, pp. 15–51.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce

Commission. The judgment of the district court was entered on December 20, 1954, and separate notices of appeal were filed in that court by appellants on February 17 and 18, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

Sections 3 (1), 15 (3), and 15 (4) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 3 (1), 15 (3), and 15 (4), are set forth in Appendix B, *infra*, pp. 52–54.

QUESTIONS PRESENTED

1. Whether, in narrowing the Commission's order, the district court failed to give proper effect to the provisions of Section 15 (4) and to the Commission's finding thereunder that the establishment of the prescribed through routes was "necessary and desirable" from the standpoint of providing "adequate and more economic transportation" for shippers who could not otherwise participate effectively in the efficient marketing of perishable agricultural commodities.

2. Whether Section 3 (1), prohibiting any carrier from giving any undue preference to any

person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, may apply to the situation where the persons or localities receiving preference are served by one carrier and those prejudiced are served by another.

STATEMENT

The Denver and Rio Grande Western Railroad Company ("Rio Grande") operates primarily in the States of Utah and Colorado. The Union Pacific Railroad Company ("Union Pacific") operates in the Pacific Northwest and also serves points as far east as Kansas City, Missouri, and Omaha, Nebraska. Its lines interconnect with those of the Rio Grande at Ogden, Utah. Although the Union Pacific has joint rates with other connecting carriers on transcontinental traffic moving to and from the Pacific Northwest through Ogden, it has refused for many years to establish joint rates with the Rio Grande at Ogden. As a result, such traffic can move over the Rio Grande only at combination rates which are substantially higher than the joint rates prevailing on the Union Pacific routes (*i. e.*, the routes established by the Union Pacific and other connecting carriers).

On August 1, 1949, the Rio Grande filed a complaint with the Interstate Commerce Commission asking the agency to prescribe, with respect to the foregoing traffic, joint rates over its allegedly existing through routes with the

Union Pacific. After extensive administrative proceedings, the Commission issued its report on January 12, 1953. 287 I. C. C. 611. The Commission held (pp. 615–619) that through routes over the Union Pacific-Rio Grande lines were not in existence, but found (p. 659) that it was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" that they be established (together with joint rates) for the carriage of certain commodities, principally livestock and perishable agricultural products.[1] The Commission further found (pp. 659–660) that the existing combination rates on these commodities, to the extent that they exceeded the joint rates to and from the same Pacific Northwest points via the Union Pacific routes, unduly prejudiced shippers and receivers using the Rio Grande and unduly preferred shippers and receivers using the Union Pacific routes, all in violation of Section 3 (1) of the Act.[2] The Commission accordingly ordered the establishment of through routes and joint rates for the commodities specified in the report.

[1] The agricultural commodities named in the order are fresh fruits and vegetables, dried beans, frozen poultry, frozen foods and butter and eggs, in carloads.

[2] The Commission also held (pp. 658–660) that the Union Pacific's maintenance of joint through rates on traffic to and from points on the Bamberger Railroad, a 36-mile line in Utah, while refusing to participate in like arrangements on traffic to the same points on the Rio Grande, subjected the latter to discrimination in violation of Section 3 (4) of the Act.

The Commission pointed out (pp. 655–656) that, under this country's "complex but efficient" marketing system, perishable food articles "must be moved to market with expedition and care, and over as many routes as possible"; that such movement requires that "many routes" be open to avoid "unnecessary interruptions of the free flow of such commodities" and to permit a flexible distribution process; and that a "number of services" such as storage and processing of food and grazing of cattle, not usually required in the movement of ordinary traffic, must be provided en route for perishable and semi-perishable commodities. The Commission held further (p. 656) that, although through service via the Union Pacific routes was generally as satisfactory to the shipping public as service via the Rio Grande, this was not true for perishable foods and cattle, since shippers of these commodities "are debarred from effective participation in the widespread system developed for the marketing of such commodities." The Commission stated (*ibid.*) that this conclusion was "supported and emphasized" by the fact that this traffic generally was accorded transit and reconsignment privileges which are "necessary for its efficient marketing," [3] and that

[3] Such privileges, the Commission stated (p. 634), include partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding.

the Union Pacific's routes are, as to traffic which receives such privileges at points on the Rio Grande, "inadequate and less economical" than those of the Rio Grande. The Commission also noted (p. 642) that it is the "general practice" in marketing certain agricultural commodities to divert carloads in transit as markets are found and sales are made; that shippers generally use routes over which joint rates apply so that shipments can be diverted or reconsigned without having to pay a combination of rates; and that, if a sale is lost when a shipment reaches a point through which combination rates apply, it is "frequently necessary to dispose of the shipment at that point at a forced or distress price."

On the issue of undue preference and prejudice, the Commission pointed out (p. 658) that shippers or receivers of the designated commodities who sought transit or reconsignment privileges on the Rio Grande were under a "substantial disadvantage or handicap" as against their competitors who received similar privileges while shipping over the Union Pacific at the lower rates.

In a suit brought by the Union Pacific, the district court modified the order.[1] The court held

[1] The Rio Grande brought a separate suit to review the same order. On January 15, 1955, a three-judge district court for the District of Colorado set the order aside. That court held that the "uncontradicted evidence" established that through routes already were in existence, and it remanded the case to the Commission for further proceedings. *Denver and Rio Grande Western Railroad* v. *United States*

that, although lack of in-transit privileges constituted an "inadequacy of transportation service" justifying the prescription of through routes and joint rates pursuant to Section 15 (3), (4), the evidence supported a finding of inadequacy only insofar as it related to those east-bound commodities which were actually stopped, on shippers' or carriers' instructions, for in-transit services on the Rio Grande. The court stated that such a modification of the order would eliminate short-hauling the Union Pacific except as to "shipments requiring service which is now inadequate and which service the Union Pacific cannot now give." The court further held that the Commission's finding of undue preference and prejudice was legally insufficient because Section 3 (1) outlaws only preferences and prejudices to shippers or localities served by the same carrier, and is not applicable if the persons or localities who receive the preferences are served by a different carrier than those subjected to the prejudices.

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and Interstate Commerce Commission, Civil Action No. 4492, motion for reargument and rehearing denied April 22, 1955. The United States and the Interstate Commerce Commission intend to appeal from the judgment in that case. We are advised that the Union Pacific is also appealing from the decision of the Colorado court.

[5] Circuit Judge Johnsen, dissenting, would have set the Commission's order aside in its entirety. He was of the view that prescription of through routes to provide shippers with an additional route on which transit is available at lower rates does not satisfy the requirement in Section 15 (4) that

THE QUESTIONS ARE SUBSTANTIAL

1. Section 15 (3) of the Interstate Commerce Act authorizes the Commission to establish through routes and joint rates when it deems such action "necessary or desirable in the public interest." Section 15 (4) further provides, however, that the Commission cannot establish through routes which require a carrier to short-haul itself, unless (a) the existing route is unnecessarily long, or (b) the Commission finds that the proposed route is needed to provide adequate, and more efficient or more economic, transportation.[6]

In the instant case, the Commission found that through routes were needed to provide "adequate and more economic transportation." The district court recognized that lack of transit facilities may constitute an "inadequacy of transportation service" under Section 15 (4), but it held that the evidence supported a finding of inadequacy only in the case of shipments actually stopped on the Rio Grande for in-transit services. This holding, we

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the Commission can short-haul a carrier only if necessary to provide "more economic transportation." He also disagreed with the majority view that the preference and prejudice prohibition in Section 3 (1) does not apply if two carriers are involved, but concluded that the facts of this case did not establish unreasonable preference and prejudice.

[6] A carrier is short-hauled when it is required "without its consent, to embrace in such [through] route substantially less than the entire length of its railroad * * *, which lies between the termini of such proposed through route * * *." Section 15 (4).

submit, misconceives the rationale of the Commission's decision; and rests upon an unduly narrow interpretation of the phrase "adequate, and * * * more economic, transportation."

The Commission's ultimate finding that through routes were needed to provide adequate transportation was not based solely (as the district court apparently assumed) upon the shippers' need for in-transit privileges on the Rio Grande. The finding was rested on the broader ground that lack of through routes "debarred" shippers from "effective participation" in this country's distribution system for the marketing of perishable agricultural commodities. The Commission noted that effective functioning of that system requires that "many routes" be open, and it pointed out that a "number of services" which are not required for commodities generally are required en route for the "efficient marketing" of perishable commodities.[1] In short, the need for transit privileges on the Rio Grande was only one of the subsidiary grounds which led the Commission to conclude that through routes were needed to provide adequate transportation.

This Court has stated that, in determining whether through routes are needed to provide "adequate, and more efficient or more economic, transportation," Congress intended that the interests of both carriers and shippers "should

[1] These services require both transit and reconsignment privileges en route.

be considered and a fair balance found." *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 593. We submit that the Commission properly considered these interests and struck a fair balance when it found that through routes were needed to enable shippers to participate effectively in the "efficient marketing" of perishable agricultural commodities. The question whether Section 15 (4) authorizes the Commission, on the basis of such findings, to establish through routes is a substantial one that is of obvious public importance in the administration of the Act.

2. An independent basis of the Commission's order establishing through routes was its finding that the combination rates between the Union Pacific and the Rio Grande were, to the extent that they exceeded the joint rates via the Union Pacific routes to the same points, unjust and unreasonable and unduly prejudicial of shippers and receivers using the Rio Grande, and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3 (1) of the Act. The district court held that this ultimate finding was legally insufficient, on the ground that Section 3 (1) prohibits only preference and prejudice to persons or localities located on the lines of the same carrier, and is not applicable if the persons or localities receiving the preference are served by a different carrier than those subjected to prejudice.

We believe that the Commission correctly interpreted Section 3 (1) as applicable to preference and prejudice of the kind here found to exist. Nothing in that Section indicates that it was intended to be limited to cases where the persons receiving the preference and those suffering the prejudice are served by a single carrier or by a group of carriers acting in concert. The Section broadly prohibits "any" carrier from giving any undue preference to any person, or subjecting him to any undue prejudice, "in any respect whatsoever." The Commission found that the Union Pacific, by refusing to establish through routes and joint rates with the Rio Grande, has subjected shippers who use the latter's route to undue prejudice, and, by the same token, has given undue preference to their competitors who use the Union Pacific routes. Such action would appear to violate the statutory prohibition against a carrier subjecting any person to preference or prejudice "in any respect whatsoever."

The district court's holding was based on the dictum in *Central R. Co. of New Jersey* v. *United States*, 257 U. S. 247, 259–260, that the purpose of Section 3 (1) is to prevent unjust discrimination between localities "by the same carrier or carriers." But, as the Court pointed out in *New York* v. *United States*, 331 U. S. 284, 342, that principle means only that "the Commission may not require carriers to do what they are power-

less to perform." In the *New York* case, the Commission found that the relation between the *inter*territorial class rates to Official Territory and the *intra*territorial class rates within Official Territory resulted in an unreasonable preference to Official Territory as a whole and to shippers and receivers of freight located there, in violation of Section 3 (1). The Commission corrected the territorial discriminations by prescribing new class rates, and this Court upheld the order.

If Section 3 (1) can reach differentials between territorial rate levels involving many carriers which serve various points in such territories, *a fortiori* it would appear to cover the preference and prejudice which results from the refusal of a single carrier to establish through routes and joint rates with another. Here the Commission has not directed the Union Pacific to do anything that it is "powerless to perform," but has merely directed it to establish certain operating arrangements with a connecting carrier on traffic to points which they both serve. Cf. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 648.

3. This Court should hear this appeal not only because it presents substantial questions, but also to resolve the conflicting holdings by two different district courts as to the proper scope of the Commission's order. As we have noted (*supra*, note 4), the Union Pacific and the Rio Grande sought separate review of the order in different

courts. Although in the instant case the district court upheld the Commission's findings that through routes do not exist, the Colorado district court set aside the same order on the ground that through routes do exist, and remanded to the Commission for further proceedings. If through routes already exist, the Commission may be required to prescribe joint rates on a much broader scale than are provided under the order as originally issued or as modified in this case. Thus, although the court below has held that the order goes too far and must be enjoined *pro tanto*, another court of equal jurisdiction has held that the same order does not go far enough and that further administrative proceedings are accordingly required.[8] Only this Court can dissipate the confusion which has resulted from the conflicting decisions in the Nebraska and Colorado district courts.

CONCLUSION

The questions presented by this appeal are substantial and they are of public importance. There is also a serious conflict of decision. It is respect-

[8] As noted (*supra*, note 4), the United States, the Interstate Commerce Commission and the Union Pacific intend to appeal in the *Colorado* case. That case will involve, *inter alia*, the question of the appropriate criteria to be applied in determining when a through route has been established by action of the carriers concerned.

fully submitted that probable jurisdiction should be noted.

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MAY 1955.

APPENDIX A

In the District Court of the United States for the District of Nebraska, Omaha Division

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before JOHNSEN and COLLET, *Circuit Judges*, and DEIHAHT, *District Judge*.

COLLET, *Circuit Judge*.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific brings this action to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I. C. C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Idaho, Montana, Oregon, and Washington. It is traffic from and to this

latter territory, referred to hereinafter as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern termini of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint through rate. Freight moving from and to the northwest territory from

and to all points east of Denver[1] served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northwest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northwest area and destined to the area east of Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande's complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I. C. C. 611.

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[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was (287 I. C. C. 611, 659):

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation;* second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific;* third, that the mainte-

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and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, then immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

nance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sect. 3 (4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these findings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo, and Trinidad

[2] 2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

287 I. C. C. 611, 659–660.

on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of Denver. Without joint through rates with in-transit privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs, and beans, and ship them on east to points beyond Denver, Pueblo, and Trinidad. These industries are at

a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4), Title 49 U. S. C. A. Secs. 15 (3) and 15 (4). Sec. 15 (3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

[3] Sec. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *.

[4] Sec. 15. (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any inter-

The Commission accurately states the legal effect of Sec. 15 (4) in its report (*Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I. C. C. 611) at page 655, as follows:

> Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient, or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which af-

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mediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. * * *

> firmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co., supra*, the supreme court said that the expression "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.
>
> In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the

east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points between Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis for ordering "adequate" transportation. The argument is made in effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy of transportation. Reference is made to excerpts from

opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. *Pennsylvania R. Co.; et al.* v. *United States, et al.*, 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual

conclusion may not be overturned when supported by the evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Ogden and Provo served by both the Union Pacific and the Rio Grande and to be reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial

needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3 (1). Title 49 U. S. C. A. Sec. 3 (1). That section is as follows:

> SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio

Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3 (d) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference prohibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows (loc. cit. 259–260):

> What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the

same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose of scope of section 3.

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the northwest area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

> SEC. 3. (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate

> in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred.

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the

Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

FINDINGS OF FACT

I

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes and joint rates with the Rio Grande comparable to those

existing between the Union Pacific and the Bamberger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo, and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo, and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II

The evidence supports the finding of the Commission that it is necessary, in order to provide

adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III

To the extent that the order of the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo, or Trinidad said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations spec-

ified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

IV

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

Copy filed District of Nebraska, Oct. 22, 1954. Mary A. Mullen, Clerk.

Civil Action No. 76–53

Union Pacific R. Co. v. *United States*

JOHNSEN, *Circuit Judge,* dissenting.

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles." Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific]. * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon, and Washington] need as many markets and outlets as possible."[5] 287 I. C. C. at page 642. To comprehend or evalnate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655. The importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of

[5] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible.* This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process* be permitted." [Emphasis mine.] P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semi-perishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shipper on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them

on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process," because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make avail-

able any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U. S. C. A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation," since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's

power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situation in which the Commission cannot make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further

such new route can be declared to provide "more economic transportation," because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely, as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles." But it has, by means of some artificial

classification, included ordinary livestock as a perishable food article (P. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway." And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[6]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advis-

[6] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

able, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the

term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philosophy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in feet on the Rio Grande is 66.3 per cent greater than

that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation," because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commission says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 percent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 percent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge

that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1521 miles (Chicago), the elements of difference which I have set out are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District*

Rates, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory; as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I agree with the majority that the Commission had no right here

to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 141, as well as on the plain, contrary assumptions made in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 percent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these

facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

In the pattern of the Commission's apparent attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity

on the part of the Commission. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some parts of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right here.

APPENDIX B.

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, provides as follows:

§ 3. *Preferences; interchange of traffic; terminal facilities.*—(1) *Undue preferences or prejudices prohibited.*

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§ 15. * * * (3) *Establishment of through routes, joint classifications, joint rates, fares, etc.*

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own

initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

(4) *Through routes to embrace entire length of railroad; temporary through routes.*

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad

operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation; *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

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